

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Improving Public Safety Communications)	WT Docket No. 02-55
in the 800 MHz Band)	
)	
Consolidating the 800 and 900 MHz Industrial/ Land Transportation and Business Pool Channels)	
)	
Amendment of Part 2 of the Commission's Rules to Allocate Spectrum below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems)	ET Docket No. 00-258
)	WAIVER REQUEST EXPEDITED HANDLING REQUESTED!
)	
Petition for Rule Making of the Wireless Information Networks Forum Concerning the Unlicensed Personal Communications Service)	RM-9498
)	
Petition for Rule Making of UT Starcom, Inc., Concerning the Unlicensed Personal Communications Service)	RM-10024
)	
Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile Satellite Service)	ET Docket No. 95-18
)	

To: The Commission

**PETITION FOR PARTIAL WAIVER
OF REBANDING RULES**

Mobile Relay Associates ("MRA"), by its attorney and pursuant to Section 1.925 of the Commission's Rules, respectfully requests a waiver to allow as eligible for relocation to the ESMR band all of the incumbent (*i.e.*, site-specific) 800 MHz band stations operated as part of an integrated system within the Denver, Colorado Major Trading Area ("Market"), which are listed in Exhibit A attached hereto and incorporated herein by reference. These stations collectively amount to almost two

megahertz (2 MHz) of spectrum,¹ easily enough to construct and operate a high-density cellular system, as defined by the Commission's new rebanding rules, and more spectrum than many (if not most) non-Nextel/non-Southern Linc EA licensees hold in any one geographic area. As discussed below, grant of this waiver is consistent with the standard set forth in Section 1.925(b)(3) of the Commission's Rules.²

BACKGROUND

MRA is, and has been for many years, one of the largest closely-held 800 MHz SMR operators in the nation. Its history of the provision of service to Part 90-eligible subscribers dates back a generation, to the very beginning of the SMR industry. MRA continues to serve thousands of subscribers in the Market over its 800 MHz SMR system. MRA represents one of the prime competitors to Nextel Communications, Inc. ("Nextel") in the fleet-dispatch business in the Market. Relying on the Commission's pronouncements that there would be no difference between 800 MHz SMR site-based licenses below the "Upper 200" channels and 800 MHz auction licenses, and already having a critical mass of site-based channels in the Market, MRA reasonably chose to participate in the auctions by buying either 900 MHz SMR spectrum in the Market or by buying 800 MHz SMR

¹The Commission staff mistakenly dismissed a long-pending MRA application for a license for 854.8625 MHz at Idaho Springs, Colorado, File No. 0001558517. MRA has a timely-filed, unopposed petition for reconsideration of that dismissal, seeking *nunc pro tunc* reinstatement and grant of the application. MRA asks herein that upon reinstatement, this license be treated the same as the rest of MRA's 800 MHz spectrum, and relocated together with the other MRA spectrum.

²That subparagraph provides in pertinent part as follows:

The Commission may grant a request for waiver if it is shown that:

- (i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.

spectrum in other geographic areas.

Now, as a result of the rule and policy changes announced by the Commission's various decisions in the captioned rulemaking proceeding, MRA finds itself prohibited from making the eventual evolution to high-density cellular architecture which it reasonably believed it had the right to do, respecting its 800 MHz SMR spectrum in the Market. This is so even though MRA holds enough 800 MHz spectrum in the Market to justify such an evolution – more than many EA (auction) licensees that are allowed to relocate into the new ESMR band, not because they hold as much spectrum as does MRA, but only because of how their spectrum was initially licensed.

SPECIFICS OF THE REQUESTED WAIVER

In its *Memorandum Opinion and Order* released October 5, 2005 in the captioned proceeding, 20 FCC Rcd. 16015 (2005) (“*2005 Recon Order*”), the Commission ruled that all 800 MHz EA licensees may elect to relocate into the ESMR band with all of their channels, whether EA-based or site-based. However, the Commission conditioned this relocation right upon the condition that any licensee so electing must, by the end of the current EA license term:

- relocate their systems to the ESMR band (including applying for and receiving any necessary license modifications);
- convert their systems, including any associated site-based facilities to ESMR technology; provide ESMR service by the end of their EA license term; and
- no later than the expiration date of their EA license, certify that they have converted their entire system, including site-based stations, to ESMR technology and are offering service to customers.

Id., 20 FCC Rcd. at ¶27 (footnotes omitted).

As MRA has as much channel capacity in the Denver EA as do most non-Nextel/non-Southern Linc EA licensees around the United States, MRA simply asks that it be allowed to relocate its Denver EA 800 MHz spectrum, listed in Exhibit A, to the new ESMR band above 862 MHz, on the same

condition as would apply if MRA were an EA licensee, *i.e.*, no later than December 10, 2010, MRA must have converted its entire system so relocated to ESMR technology and be offering service to customers.

DISCUSSION

I. In the Absence of a Waiver, the Underlying Purpose of the Rule Will Be Frustrated, and the Public Interest Will Be Harmed

Among the Commission's stated goals in this proceeding has been to keep licensees that are not the cause of unacceptable interference to Public Safety "in a position comparable to that they currently occupy." *2005 Recon Order, supra*, ¶25. It was for the purpose of achieving that very goal that the Commission decided to allow what it viewed as the class of 800 MHz licensees most likely to have the capacity and desire to convert to ESMR technology to do so, by ruling that *all* EA licensees can relocate into the new ESMR band with all of their respective channels (both EA-based and site-based). *Id.*

However, MRA is in a unique situation. MRA has sufficient spectrum capacity and the desire to convert to ESMR technology, the same as the non-Nextel/non-Southern Linc EA licensees. However, because of the anomaly that all of MRA's spectrum is site-based in origin, the *2005 Recon Order*, having drawn the line based on the holding of at least some EA-based spectrum, left MRA outside the universe of licensees that obtained relief in that order.

Patently, the Commission's goal had been to keep all licensees in a comparable position to where they had been before the new rebanding rules were implemented, and the Commission expected that only licensees holding EA-based spectrum would have sufficient spectrum capacity to convert to ESMR technology, so that limiting relocation relief to that class would accomplish the stated goal. But

in MRA's unique case, enforcement of the rule would frustrate that stated goal of keeping licensees holding sufficient spectrum capacity in a comparable position.

Moreover, since MRA remains one of Nextel's primary competitors in the fleet-dispatch market within the Denver EA, MRA's continued presence as an independent competitor hinders Nextel's ability to exert market power in that market segment, constraining Nextel in the areas of both price and quality. Therefore, it is in the public interest to grant the requested waiver, and thereby leave MRA in position to constrain Nextel's market power and thereby improve pricing and service quality to customers.

II. In View of MRA's Unique Circumstances, Application of the Rule to MRA Would Be Inequitable, Unduly Burdensome, and Contrary to the Public Interest, and MRA Has No Alternative

In the unusual, possibly unique case of MRA, the existence or non-existence of EA-based licenses is not an accurate predictor of spectrum capacity. At the time of the 800 MHz SMR auctions, the Commission said that all 800 MHz SMR spectrum, whether EA-based or site-based, would have the same future rights with respect to technology choices, and also said there would be no forced relocation.³ Relying on the Commission's playing field thus announced, MRA, having already a large 800 MHz SMR spectrum position in the Denver EA, concentrated its bidding strategy upon other geographic areas. At the time of the auction, MRA's licenses gave it the capacity and the right to convert to ESMR technology as the industry evolved.

³See, e.g., *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Second Report and Order*, 12 F.C.C.R. 19079, 19105 (1997) (allowing incumbents to add transmitters and alter their coverage areas so long as they did not expand their 22 dBu contours; thereby enabling incumbents to use cellular architecture the same as auction licensees).

Thus, through no fault of its own, MRA found itself without any EA-based license within the Denver EA when the Commission announced its decisions in this proceeding. Although MRA is precisely the type of licensee that would need to convert to ESMR technology by the end of this decade to remain competitive and would want to implement high-capacity cellular architecture due to the geographic dispersion of demand within the Denver EA, and although MRA has sufficient spectrum to make such a conversion, the Commission's line-drawing has left MRA stripped of its right to so convert.

To deny MRA the right to relocate into the ESMR band together with all the other licensees of its size, merely because MRA was more successful in accumulating a critical mass of site-based spectrum, is inequitable and unduly burdensome. Therefore, good cause exists for grant of the requested waiver.

CONCLUSION

Good cause exists within the standards of Section 1.925 of the Commission's Rules to grant a waiver to enable MRA to relocate its 800 MHz spectrum in the Denver EA into the new ESMR band above 862 MHz the same as if it were an EA-based licensee not yet operating ESMR technology, and subject to the same conditions which apply to such non-ESMR EA licensees. The underlying purpose of the Commission's rule allowing EA licensees to relocate but not site-based licensees – to leave each class of licensees in a comparable position to where it was before the implementation of rebanding – would be frustrated by the strict application of the rules to MRA, because the large size of MRA's site-based holdings and its status as one of the larger competitors to Nextel in the Denver fleet-dispatch market make MRA more akin to an EA licensee than to a typical site-based licensee.

The public interest is best served by preserving MRA as the main competitor to Nextel in the

Denver-area fleet-dispatch market. MRA, whose large holding of site-based spectrum is at least unusual and probably unique, is therefore uniquely situated such that the application of the rule to MRA would be inequitable and unduly burdensome, and MRA has no viable alternative to receiving this requested waiver.

Accordingly, MRA requests that the Commission grant it a waiver to relocate all of the licenses listed in Exhibit A hereto into the ESMR band, conditioned upon MRA having constructed an ESMR technology system on all of that spectrum by December 10, 2010, and be offering ESMR technology service to the public by that date.

Respectfully submitted,
MOBILE RELAY ASSOCIATES

By: 

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Channel List for Denver Metro Area

01/24/2006

Site	Receive Freq.	Transmit Freq.	Home Chan.	Licensee	Callsign
Bear Mtn.	808.4125	853.4125	2	MRA	WPKM267
Bear Mtn.	806.6125	851.6125	6	MRA	WPYR812
Bear Mtn.	809.9375	854.9375	10	MRA	WPYR812
Bear Mtn.	810.1625	855.1625	14	MRA	WPYR812
Bear Mtn.	810.1875	855.1875	14	MRA	WPYR812
Dillon	810.0125	855.0125	6	MRA	WPZT722
Eldorado Mtn.	807.1125	852.1125	3	MRA	KNHH521
Eldorado Mtn.	806.2875	851.2875	20	MRA	WNXN898
Eldorado Mtn.	806.6625	851.6625	19	MRA	WNXN898
Eldorado Mtn.	807.4375	852.4375	18	MRA	WNXN898
Eldorado Mtn.	807.7375	852.7375	14	MRA	WNXN898
Eldorado Mtn.	807.8875	852.8875	7	MRA	WNXN898
Eldorado Mtn.	808.2125	853.2125	10	MRA	WNXN898
Eldorado Mtn.	808.3875	853.3875	15	MRA	WNXN898
Eldorado Mtn.	808.5875	853.5875	11	MRA	WNXN898
Eldorado Mtn.	808.7125	853.7125	8	MRA	WNXN898
Eldorado Mtn.	808.8875	853.8875	16	MRA	WNXN898
Eldorado Mtn.	809.0125	854.0125	6	MRA	WNXN898
Eldorado Mtn.	809.2125	854.2125	12	MRA	WNXN898
Eldorado Mtn.	809.5125	854.5125	2	MRA	WNXN898
Eldorado Mtn.	809.7875	854.7875	13	MRA	WNXN898
Eldorado Mtn.	810.6625	855.6625	4	MRA	WNXN898
Eldorado Mtn.	810.7875	855.7875	5	MRA	WNXN898
Eldorado Mtn.	810.2625	855.2625	2	MRA	WPTA425
Horsetooth Mtn.	806.2875	851.2875	2	MRA	WYY839
Lee Hill	806.0375	851.0375	20	MRA	WNCD872
Lee Hill	807.3125	852.3125	16	MRA	WNCD872
Lee Hill	808.0125	853.0125	12	MRA	WNCD872
Lee Hill	809.1125	854.1125	8	MRA	WNCD872
Lee Hill	810.5125	855.5125	4	MRA	WNCD872
Lee Hill	811.6625	856.6625	18	MRA	WNCD872
Lee Hill	812.6625	857.6625	14	MRA	WNCD872
Lee Hill	813.6625	858.6625	10	MRA	WNCD872
Lee Hill	814.6625	859.6625	6	MRA	WNCD872
Lee Hill	815.6625	860.6625	2	MRA	WNCD872
Lee Hill	810.6625	855.6625	1	MRA	WPEQ759
Lookout Mtn.	806.4875	851.4875	2	MRA	WYY828
Lookout Mtn.	806.5625	851.5625	6	MRA	WYY828
Squaw Mtn.	809.8625	854.8625	2	MRA	Pending*
Golden (Coors)	809.9375	854.9375	2	MRA	WPCA896
Golden (Coors)	810.1875	855.1875	6	MRA	WPCA896
Golden (Coors)	810.1625	None	10	MRA	WPCA896

*FCC File No. 0001558517, dismissed but reconsideration pending.